Supreme Court, U.S.
FILED

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No. -_____

In The

Supreme Court Of The United States

PAUL MOLNAR

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court of the State of California

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

PAUL MOLNAR
16238 Avenida Suavida
San Diego, CA 92128
Telephone: (858) 485-0086
Petitioner in Propria Persona

40 pp

INDEX TO SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Exhibit		Pages
A.	Substantive Opinion of the Court of Appeals, State of California, Fourth Appellate District, Division One	1-36
B.	Order of the Court of Appeals, Denying Rehearing	37

EXHIBIT A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

PAUL MOLNAR,	)	D033080
	)	
Plaintiff and Appellant,	)	
	)	(Super.Ct. Nos.
v.	)	685793/711535)
	)	
REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,	)	
	)	
Defendants and Respondents.	)	

DEC 2 2 2000
Court of Appeal Fourth District

APPEAL from a judgment of the Superior Court or San Diego County, Charles r. Hayes, Judge. Affirmed.

In this wrongful termination action, consolidated with a companion action on related theories, plaintiff Paul Molnar sued his former employer, the Regents of the University of California and numerous individual defendants (collectively the Regents or the University), for damages and reinstatement based on fraud, conspiracy, infliction of emotional distress, and several statutory causes of action.[1] The action arose out of Molnar's time

[1] The individual defendants are various Regents labor relations personnel (Kathy McKinney, Michael Melman and d.

as a marine mechanic employed at the Scripps Institute of Oceanography marine facility (MARFAC) at the University of California, San Diego (UCSD). The bulk of Molnar's claims is based on alleged discrimination and harassment based on retaliation for bringing employment-related grievances and/or discrimination on the basis of national origin (Czechoslovakian) in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code,[2] § 12900 et seq.).

Before trial, a number of Molnar's causes of action were disposed of through motion proceedings. At trial, the remaining portions of his actions were dismissed after a nonjury trial of the Regents' defenses, including collateral estoppel based on the outcome of an underlying administrative proceeding in which he appealed his medical separation from employment.

Wyman) or supervisory employees at the marine facility (Joseph Corduan, B. Armistead and Thomas S. Althouse). In addition, Molnar sued Regents' Vice Chancellor for Personnel Affairs Nolan Penn and Molnar's workers' compensation physician, Dr. Vert Mooney (who found hm unable to return to work). There are no significant individualized arguments made on appeal about the liability of any of these individuals, and we may treat them as a group for purposes of analyzing Molnar's contentions.

[2] All statutory references are to this code unless otherwise stated.

Molnar appeals the judgment of dismissal and underlying orders. After reviewing the record, we have determined that all the trial court's rulings were well grounded in fact and law, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

From 1979 to 1996, Molnar was employed as a senior marine mechanic at the Regents' marine facility. Between 1979 and 1986, Molnar filed 10 grievances about different warnings or evaluations he received on the job, and about another employee's advancement. From 1993 to 1995, Molnar pursued several more grievances concerning disciplinary actions taken against him on grounds of tardiness, not following work rules, and not wearing safety glasses. He contends these actions were taken in retaliation against him for a complaint he made to his superiors about his denial of a promotion, while another employee was unfairly promoted, and about another employee who was permitted to operate a crane without sufficient training.

Molnar was absent from work on a stress leave of absence from March 1, 1995 through August 25, 1995. He returned to work for one day but went out on leave again. He returned to work October 16, 1995. He then reported a back injury and went on another leave of absence under workers' compensation. He exhausted his paid leave on May 5, 1996. At that point, management requested a medical separation evaluation be conducted, along with a study of potential accommodations for his condition that might allow him to return to work.

Workers' compensation physician, defendant Dr. Mooney, evaluated Molnar between January and June 1996 and found him unable to perform his job on a permanent basis. No reasonable accommodations were found to be available at his current position. The MARFAC supervisor, defendant Captain Althouse, notified Molnar that a medical separation was being sought. Molnar requested an evaluation by another physician and threatened to sue. The medical separation became effective July 26, 1996. Molnar did not provide any second medical evaluation of his condition.

Molnar filed a grievance with the Regents regarding his medical separation, contending he had been terminated due to discrimination based on his national origin and retaliation for bringing grievances. The grievance was handled according to the Regents' process, which followed two tracks: (1) The lack of reasonable accommodations made available at his current job was subject to fact-finding and appeal through a complaint resolution process within the university only; and (2) the medical separation issues were subject to hearing and a final and binding decision by an outside hearing officer. Fact-finding proceedings were conducted on all issues, and a report forwarded to Rogers Davis, the Regents' assistant vice chancellor for human resources. Vice chancellor Davis issued a decision denying the appeal of the denial of the grievance and finding reasonable accommodations had been made. This decision was final on that issue. Davis also decided that the medical separation was appropriate under university policy.

Molnar specifically appealed the denial of his grievance regarding his termination to the hearing officer, on the issues of employment discrimination, retaliation, and medical separation.

An outside arbitrator, Joseph F. Gentile, was appointed as the hearing officer for the administrative proceedings. Molnar was informed of the hearing date on May 30, 1997 and advised that a failure to appear at the hearing would constitute a waiver of his rights. This hearing took place September 29, 1997, and proceeded in Molnar's absence with the taking of evidence and argument. Gentile issued written findings and an award, concluding there had been no discrimination on the basis of disability, age or national origin. Gentile found Molnar had not been subjected to retaliation in his medical separation. The grievance was denied and the termination was upheld. The Regents' director of labor relations, Michael Melman, sent a copy of this decision to Molnar, advising him that the decision was final and binding. Molnar did not file any Superior Court proceedings seeking a writ of administrative mandate to challenge the outside hearing officer's decision. (Code Civ. Proc., § 1094/5.)

Meanwhile, workers' compensation proceedings were going on. On April 11, 1997, the Workers' Compensation Appeals Board upheld an earlier finding that Dr. Mooney's June 1996 reports that Molnar was disabled could not be used in workers' compensation proceedings, because of Mooney's bias. Molnar was allowed to obtain

a second evaluation, but never did so. Eventually, a year after his medical separation, he was denied workers' compensation or rehabilitation benefits due to a finding he was not disabled.[3]

On February 23, 1995, Molnar filed his first superior court action arising out of these events, *Molnar v. Regents et al.* (Super. Ct. San Diego, No. 685793) (the pre-termination action). He alleged the following causes of action in his second amended complaint, the operative pleading:

1. Violation of section 12940, subdivision (a), national origin discrimination (FEHA).

2. Retaliation in violation of section 8547.10 (pertaining to internal complaints of improper workplace activity made to the Regents).

3. Retaliation in violation of Labor Code section 1102.5 (pertaining to protected complaints made to law enforcement agencies).

4. Violation of Civil Code sections 51 et seq. (Unruh Civil Rights Act).

5., 6. These causes of action in tort were not challenged on appeal.

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[3] The trial court excluded evidence showing the denial of workers' compensation or rehabilitation benefits, as not pertinent to the collateral estoppel issues arising from the separate administrative hearing before hearing officer Gentile. However, the parties do not dispute that Molnar did not receive such benefits.

7. Defamation.
8. Conspiracy.

The parties pursued discovery and motion proceedings in this action. It was removed to federal district court for a period of time but returned. While it was pending, Molnar received his notice that he had been medically separated from employment. He then filed his next complaint based on termination of his employment June 16, 1997, alleging the following causes of action:

1. Retaliation in violation of FEHA, section 12940, subdivision (a).
2. Wrongful termination in violation of public policy.
3. Fraud.
4. Conspiracy to defraud.
5. Intentional infliction of emotional distress. (Sup.Ct. No. 711535.)

Further discovery and motion proceedings took place. The two cases were consolidated at Molnar's request on August 8, 1997. The Regents brought a demurrer to the termination complaint which was overruled in part as to the claim that Molnar had failed to exhaust his administrative remedies. The trial court found Molnar had adequately pled a recognized exception to the requirement for exhaustion of internal administrative requirements (citing *Edgren v. Regents of the University of California* (1984) 158 Cal.App.3d 515). However, the demurrer was sustained without leave to amend as to the intentional infliction of emotional distress cause of action, evidently

as barred by the exclusive remedy of workers' compensation.

Next, the Regents moved for summary judgment, arguing that a number of the causes of action had no merit, or alternatively, sought summary adjudication of each cause of action. (Code Civ. Proc., § 437c, subd. (c), (f). Summary judgment was denied based on triable material issues of fact as to exhaustion of internal administrative remedies by Molnar. Although the trial court declined to adjudicate the 18 specified issues, due to procedural deficiencies, the trial court proceeded on its own motion as a matter of law to strike certain causes of action as follows: The pre-termination cause of action for violation of the Unruh Civil Rights Act was stricken as inappropriate in the employment context; the pre-termination cause of action for civil conspiracy was stricken because it did not represent a separate and independent tort. In the termination action, the fraud and conspiracy to defraud causes of action were stricken on the grounds that an employee's fraud claims arising out of termination were barred under applicable Supreme court case law. (*Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174; *Lazar v. Superior Court* (1996) 12 Cal.4th 631.)

Next, the Regents brought motions for issue and evidentiary sanctions based on Molnar's noncompliance with discovery requests. The court ruled that some of Molnar's supplemental responses were adequate, but he would be precluded at trial from offering evidence about the subject of two inadequate responses: The dates on

which he was allegedly discriminated or retaliated against because of his ancestry; or to support his contention that "'it is not possible to comply with Regents' administrative procedures as the word "comply" is normally used in the English language'" (as alleged in Molnar's termination action). (Interrogatory responses nos. 23, 27.) The court found Molnar was not entitled to rely on Code of Civil Procedure section 2030, subdivision (f)(2) by referring to a list of documents or the Regents' own documents.

Jury trial was requested. At the Regents' motion, the trial court severed the trial to hear specific defenses first. (Code Civ. Proc., § 597.) Specifically, the Regents claimed that collateral estoppel applied to bar the allegations of the complaint, due to the ruling of the hearing officer in the administrative proceedings that the medical separation was proper. The defenses of exhaustion of administrative remedies and the evidentiary sanctions imposed required a determination of whether Molnar's termination case or pre-termination case were barred. The Regents also asserted defenses that they and their employees were covered by governmental immunity. (§§ 815, subd. (b), 818.2, 820.2.)

All these defenses were found meritorious and Molnar's pre-termination action was held barred and was dismissed. In particular, the retaliation and discrimination FEHA cause of action was dismissed pursuant to the evidentiary sanctions granted and for failure to exhaust internal administrative remedies. Specific rulings were made dismissing the various statutory causes of action, as

will later be discussed. The defamation cause of action was held to be barred by governmental immunity. (§§ 820.2, 821.6.) As for the termination action, it was held barred under the collateral estoppel doctrine. The remainder of the causes of action had previously been disposed of through pretrial motions.

Proceedings to determine the Regents' costs followed and will be described in some detail in part IV, *post*. Judgment was entered accordingly and Molnar appealed.

DISCUSSION

Four sets of issues presented. First, with respect to the pre-termination action, did the trial court err in disposing of certain of Molnar's causes of action through summary adjudication or dismissal, and by imposing evidentiary sanctions to preclude evidence from being admitted on certain claims?

Second, in the termination action, did the trial court abuse its discretion in ruling on the demurrers to the emotional distress claim? Was summary adjudication properly granted on the fraud and conspiracy allegations?

Third, did the trial court properly sever the trial to conduct a nonjury trial of certain defenses, including collateral estoppel?

Finally, was the costs award correct? We discuss these several claims separately.

I.
Pre-termination Action Issues

A
Summary Adjudication

Generally, a defendant meets its burden upon summary judgment motion if that party has proved "one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (o)(2).) Once the defendant's burden is met, the "burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists . . . ." (*Ibid.*) In opposing the motion, "[t]he plaintiff. . . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists . . . ." (*Ibid.*; *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 234.)

On appeal from the ruling on a motion for summary judgment or adjudication of issues, the appellate court conducts its own independent review of the moving and opposition papers and applies the same standard as the trial court in determining whether the motion was properly granted. (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819.) "The appellate court is not bound by the trial court's stated reasons for its ruling on the motion, as the appellate court reviews only the ruling and not its rationale. [Citation.]" (*Muller v. Automobile Club of Southern California* (1998) 61 Cal.App.4th 431, 438-439.)

We first address the trial court's decision to summarily adjudicate against Molnar the Unruh Civil Rights Act cause of action, and then the conspiracy claim. Molnar alleged violations of Civil Code section 51.7(a), which provides, "All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin . . . . The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive . . . ." The basis of these allegations is that his supervisor, individual defendant Corduan, assaulted him and had a discriminatory animus while doing so.

This cause of action was properly stricken because it is well established that the Unruh Act does not apply to the employment relationship between Molnar and the Regents. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 77.) The Legislature intended the Unruh Act to apply to the actions of a business establishment in the course of furnishing services or goods to customers or clients. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 500.) Although we need not address the issue of whether the Regents can ever ben considered a business establishment, it is clear that all of Molnar's allegations relate to the Regents in its capacity as an employer. The individual defendants do not meet this definition. Accordingly, the Unruh Act cause of action does not apply to the Regents as a matter of law.

Turning to the pre-termination action's separate claim for conspiracy, it would depend on the allegation of an

underlying tort which the alleged conspirators pursued under a common plan or design. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511.) As will be discussed further in this opinion, Molnar has not successfully alleged any such legitimate underlying cause of action upon which the conspiracy claim can be predicated. There was no prejudicial error in dismissing this cause of action.

B

Evidentiary Sanctions

Based on a finding that Molnar had not fully complied with this discovery obligations, the trial court precluded him at trial from offering evidence about the subject of two particular interrogatories: The dates on which he was allegedly discriminated or retaliated against because of his ancestry; or that, "'it is not possible to comply with Regents' administrative procedures as the word "comply" is normally used in the English language'" (as alleged in Molnar's termination action). (Interrogatory responses nos. 23, 27.) The court rejected Molnar's contention he was entitled to rely on Code of Civil Procedure section 2030, subdivision (f)(2) by referring to a list of documents (a 29-page inventory, including his grievances, his medical records, letters, or pleadings), or the Regents' own records. The time from which the interrogatories were served until the sanctions ruling ran from September 1997 through May 1998.

The effect of this ruling was a dismissal of Molnar's

FEHA cause of action in the pre-termination suit, because he could not show any actionable discrimination or retaliation against him because of his membership in a protected category. (§ 12940, subd. (a).)[4] (There was no direct effect, in terms of any dismissed claim, of the sanction imposed about the alleged impossibility of complying with the grievance process.) Molnar claims this ruling amounted to an abuse of discretion. (*Fuss v. Superior Court* (1969) 273 Cal.App.2d 807, 814-815.)

Under Code of Civil Procedure section 2030, subdivision (f)(1), interrogatory responses are required to be as complete as the information reasonably available to the party will allow. It is not proper for a party to refer to other documents without making a complete response. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783-784.) Molnar's reliance on Code of Civil Procedure section 2030, subdivision (f)(2) is misplaced, because his responses did not amount to a reference to the preparation of a compilation of documents equally available to both parties. It was not unreasonable for the Regents to seek information about the dates of the events that were allegedly affected by ancestry discrimination against Molnar. The trial court's order was well within its

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[4] Section 12940 provides in pertinent part that generally, it is an unlawful employment practice, "(a) For an employer, because of race, religious creed, color, national origin, ancestry. . . . of any person, to refuse to hire or employ the person . . . or to discriminate against the person in compensation or in terms, conditions, or privileges of employment"

discretion in granting the challenged evidentiary sanctions.

C

Dismissal at Trial of Substantive Causes of Action

At trial, due to the evidentiary sanctions outlined above (part IB), Molnar was ruled to be unable to prove his contentions of FEHA violations in the pre-termination action. Also with respect to the pre-termination action, the trial court dismissed three additional causes of action (two statutory claims, as well as defamation) as legally insufficient or barred by applicable defenses. We discuss these in turn.

1.

First, Molnar alleges he was entitled to damages for improper retaliation against him for making protected complaints under section 8547.10 of improper workplace activity by others (inadequately trained persons performing certain activities). Section 8547.10 is specifically addressed to the University of California, providing a comprehensive scheme for its employees to make legitimate complaints in a protected manner about improper activities, including in the personnel action context. The complaint is to be submitted along with a sworn statement that the contents of the complaint are true. The section further reads in relevant part:

> "[A]ny person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university employee, including an

> officer or faculty member, or applicant for employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party . . . [provided that] the injured part has first filed a complaint with the [appropriate] university officer . . . and the university officer has failed to reach a decision regarding that complaint within [a certain time established by the Regents]".
>
> (§ 8547.10(c).)

Thus, section 8547.10 applies by its terms to internal complaints to a supervisor at the University. The trial court's ruling was that Molnar's complaint was adequate in form, even though the sworn statement was submitted late, but that Molnar should be estopped from complaining about the Regents' failure to timely decide his complaint, since his own conduct led to the delay.[5]

The trial court had the power to decide the relevant questions of fact as to whether an equitable estoppel exists. (11 Witkin, Summary of Cal. Law (9th ed., 2000 supp.) Equity, § 177, p. 434.) Where a separate defense is presented for trial under Code of Civil Procedure section 597, the trial court does not reach the underlying disputed material factual issues to be resolved in the case, but

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[5] The Regents would have us rule that the formal defects in Molnar's complaint rendered it unenforceable. We prefer to adopt the trial court's analysis in this respect, since it was the Regents' representative who gave Molnar the form to fill out.

instead only addresses any essentially legal issues, such as "mixed fact-law determinations involving, for instance, the assertion of jurisdiction," or whether a prior adjudication was a judgment on the merits. (*Windsor Square Homeowners Assn. v. Citation Homes* (1997) 54 Cal.App.4th 547, 557-558.) "While all these issues may have factual predicates, they are peculiarly legal determinations." (*Ibid.*) Accordingly, Molnar is mistaken that a jury trial was required to determine all the underlying factual issues regarding estoppel under Code of Civil Procedure section 597.

Here, the background facts were that Molnar's improper activity reports were submitted in January 1994 and August 1994. The Regents assigned Dean Charles (Chips) Dreilinger as Retaliation Complaint Officer (RCO) to complete fact-finding on the reports. Molnar unsuccessfully challenged his assignment and then requested delays, and then did not submit a written summary chronology which he agreed to prepare. Dreilinger sent Molnar a letter dated March 29, 1995 stating he was prepared to issue a decision on the claim. The letter stated that Molnar had until April 17, 1995 to submit the promised documents or the decision would be issued. Molnar called Dreilinger, informed him he was disabled, and requested that any decision be withheld. Dreilinger understood that the documents would eventually be forthcoming and that Molnar would advise him when he was medically able to proceed. However, Molnar never contacted him and the decision was never issued.

Under Regents policy G-29, the Retaliation Complaint Officer (RC0) must render his or her decision on such a complaint within a reasonable time or within specific time limits. Molnar makes a complicated argument that the Regents failed to meet their own deadline for determining his complaint, because another Regents policy, SPP 290.13 (Staff Personnel Policy dealing with administrative review) somehow incorporates its 90-day limitation into the Regents policy G-29. However, nothing on the face of either policy shows such incorporation was intended. Also, the improper activities reports were not filed under SPP 290, so there is no basis for the time limits of that policy to apply to these claims. Molnar has not shown why the judgment must be reversed on this basis.

Finally, under a parallel statutory system that applies to the California state university system, 18 months is allowed to issue a decision on this type of claim. (§ 8547.12.) The Regents are required only to set a reasonable time frame for their decision. That requirement was not abused here. The trial court had an adequate basis to dismiss this claim on the basis of equitable estoppel.

2.

Next, Molnar contends that he has an actionable claim under Labor Code section 1102.5, again based on the Regents' response to his complaints of improper workplace activity by others. This section provides in relevant part:

"(a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation. [¶] (b) No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation."

The plain language of the section prohibits employers from retaliating against an employee who discloses information to a *government or law enforcement agency*, where the employee has reasonable cause to believe that the information discloses a violation or non-compliance with state or federal laws or regulations. On August 14, 2000, we granted the Regents' request to take judicial notice of legislative history materials regarding a companion section to Labor Code section 1102.5., i.e., Labor Code section 1106, dealing with the definition of those employees who are entitled to make such protected complaints to law enforcement entities such as the Attorney General (as opposed to internal complaints to the employer's officials). (Evid. Code, § 452, subd. (c).) This definition includes employees of the Regents. (Lab. Code,

§ 1106.) These materials show why Molnar's Labor Code section 1102.5 cause of action cannot survive. It and its companion section Labor Code section 1106 were enacted to prevent retaliation against employers or employees who make good faith efforts to report violations of law to the Attorney General or law enforcement. (Cal. Dept. Finance, Analysis of Assem. Bill No. 3486 (1991-1992 Reg. Sess.) As amended Apr. 21, 1992; Assem. Com. on Ways and Means, Republican Analysis of Assem. Bill No. 3486 (1991-1992 Reg. Sess.) as amended Apr. 21, 1992, p. 1.) This is far different from the factual context in which Molar acted, by making an internal complaint to a University supervisor. While the Regents are in some sense a government entity, they do not normally vindicate state or federal laws or regulations in the same sense as a law enforcement agency does, by taking complaints from source external to the entity itself.

Further, Labor Code section 1102.5 is more general in application than section 8547.10, which applies specifically to internal complaints at the University of California. As such, the more specific statute should be applied isn the employment context against the Regents. (See *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22.)

3.

Finally, with respect to the defamation cause of action, Molnar based his allegations on personnel and disciplinary documentation, all of which was prepared in the normal course of business at the Regents' facilities. He mainly claims his supervisor Corduan made defamatory

workplace reports, statements, and complaints about him.

The trial court ruled that the Regents and the public employee defendants had immunity from liability for acts within their official capacities under section 821.6, pertaining to employee disciplinary proceedings, both as to acts that initiate proceedings and defamation actions. (*Kemmerer v. County of Fresno* (1998) 200 Cal.App.3d 1426, 1435-1437 (*Kemmerer*).) This ruling was a correct application of the statute, since Corduan's statements were made in a disciplinary context or the initiation of such proceedings.

Further, section 820.2 provides public employees shall not be liable for an injury resulting from acts or omissions that are exercises of discretion. Discretionary acts performed by public employees in the discharge of their duty are afforded absolute immunity. (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 982-989.) Disciplinary proceedings fall within the scope of this discretionary acts immunity. (*Kemmerer, supra,* 200 Cal.App.3d at pp. 1437-1439.)

Individual public employees are afforded the above immunities. The Regents, their employer, are likewise afforded immunity under section 815.2, subdivision (b). Moreover, to the extent any liability for misrepresentation is sought in this context, the immunities of section 818.8 also apply. The trial court correctly dismissed the defamation cause of action.

II.

Termination Action Issues

A.

Demurrer Ruling

These rules of pleading apply:

> "On appeal from a judgment of dismissal entered after a demurrer has been sustained without leave to amend, unless failure to grant leave to amend was an abuse of discretion, the appellate court must affirm the judgment if it is correct on any theory. [Citation.] If there is a reasonable possibility that the defect in a complaint can be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend. [Citation.] The burden is on the plaintiff, however, to demonstrate the manner in which the complaint might be amended. [Citation.]" (*Blendy v. Losse* (1991) 54 Cal.3d 723, 742.)

Molnar attacks the unfavorable ruling on his intentional infliction of emotional distress cause of action in the termination action by contending that he alleged several theories that were independent of the employment termination context and which should have survived any ruling that was based on the bar of the exclusive workers'

compensation remedy. (Lab. Code, § 3600 et seq.).[6] For example, Molnar contends that his Labor Code section 1102.5 cause of action in the pre-termination action would have supported emotional distress damages. In the termination action, he contends that his cause of action based on alleged public policy violations through his termination, to the extent it was contrary to FEHA principles, would have supported an emotional distress cause of action.

The problem with these theories is that in many cases, the emotional distress that may be caused by misconduct in employment relations (with respect to promotions, demotions, criticism of work practices, or grievance negotiations) must be considered to be within the normal range of the employment environment. In *Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 352-353, the Court of Appeal explained that a cause of action for such a claim is barred by the exclusive remedy provisions of the workers' compensation law, unless the claim is "founded upon actions that are outside the normal part of the employment environment . . . ." (*Id.* at p. 353; see *Shoemaker v. Myers, supra,* 52 Cal.3d 1, 25.) Here,

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[6] The Regents concede that a prayer for emotional distress damages would have been properly allowed in the pre-termination action if any of Molnar's substantive causes of action had survived the pretrial process and gone to the jury. However, that did not happen, and thus any error in removing emotional distress damages claims from the pre-termination action should be regarded as harmless.

Molnar's claims in this respect are fundamentally based on his contentions about his treatment in the workplace and during the grievance process. As such, the intentional infliction of emotional distress claim was properly subject to demurrer under these circumstances.

B.

Fraud/Conspiracy Allegations

The trial court summarily adjudicated these two related causes of action in favor of the Regents. (Code Civ. Proc., § 437c, subd. (f).) The court reasoned that an employee's fraud claims arising out of termination were barred under applicable Supreme Court case law. (*Hunter v. Up-Right, Inc., supra*, 6 Cal.4th 1174, 1184-1185; *Lazar v. Superior Court, supra*, 12 Cal.4th 631, 642.)[7] Molnar attacks this conclusion, claiming the cited authority is distinguishable because in those cases, there was a valid basis to terminate the plaintiff, and the fraud allegations were essentially extraneous to the termination claim. According to Molnar, the Regents fraudulently manipulated the grievance procedures and there was no valid basis to terminate him that can be separated out from the alleged fraudulent actions. (See *Hunter v. Up-Right, supra*. 6 Cal.4th at p. 1178: Wrongful termination of

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[7] The trial court did not reach the issue of whether governmental immunities applied to protect the Regents from these fraud claims. Although the Regents urge this court to uphold the ruling on such grounds, we need not discuss them because the trial court ruling was correct on the stated grounds.

employment ordinarily does not give rise to a cause of action for fraud, even if some misrepresentations are made in the course of the employee's firing. A separate tort can be pursued only if the plaintiff can establish all of the elements of fraud with respect to a misrepresentation that is separate from the termination of the employment contract, such that any fraud damages do not result from the termination itself.)

We disagree with Molnar that the Regents' representations that he would be medically separated from employment, but could bring a grievance, amounted to fraudulent representations on which any detrimental reliance could have been made. Molnar seeks damages resulting from his termination of employment, and the action is confined to that underlying factual scenario. Molnar has not shown the existence of triable issues of fact about other damage that he sustained due to the alleged fraud. His argument that he did not qualify as disabled under the workers' compensation system raises different issues and does not support is fraud claims. Also, the conspiracy cause of action cannot stand alone. (*Applied Equipment Corp. v. Litton Saudi Arabia, Ltd., supra*, 7 Cal.4th 503, 511.) There was no error in these summary adjudication rulings.

III.

Consolidated Actions: Initial Nonjury Trial of Defenses

The Regents asserted defenses of exhaustion of

administrative remedies and the preclusive effect of the administrative ruling on this action in terms of the bar of collateral estoppel. The Regents also raised the defense that they and their employees were covered by governmental immunities. (§ 815, subd. (b), 818.2, 820.2.)

Code of Civil Procedure section 597 provides in pertinent part that when the defendant has pleaded that the action is barred by a prior judgment, "or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof," the trial court may on its own motion or that of any party proceed to the trial of the special defenses before the trial of any other issues. In such cases, if the court rules on the defenses tried in this manner in favor of the defendant, a defense judgment is entered "and no trial of other issues in the action shall proceed unless that judgment shall be reversed on appeal or otherwise set aside or vacated." (*Ibid.*) The trial court's ruling bifurcating such defenses for trial is reviewed for abuse of discretion. (*Downey Savings & Loan Assn. v. Ohio Casualty Ins.Co.* (1987) 189 Cal.App.3d 1072, 1086.)

In such a proceeding under Code of Civil Procedure section 597, as already explained above (part IC1), the trial court does not reach all the underlying disputed material factual issues to be resolved in the case, but instead only addresses any essentially legal issues raised by the defense (e.g., mixed questions of fact and law such as the comparison of pleadings, the analysis of related claims, the identity of or privity between parties, or

whether a prior adjudication was on the merit). (*Windsor Square Homeowners Assn. v. Citation Homes, supra*, 54 Cal.App.4th 547, 557-558.) We will next discuss this procedure and these rulings as they pertain to the two actions that were consolidated here, dealing first with the termination action.

A.

Collateral Estoppel Ruling: Termination Action

The trial court ruled that collateral estoppel applied to bar the remaining allegations of the termination complaint (wrongful discharge under FEHA and/or in violation of public policy), due to the ruling of the hearing officer in the administrative proceedings that the medical separation was proper. Molnar challenges this dismissal by the trial court by claiming that he qualified for an exemption from the requirements for exhaustion of administrative and judicial remedies, under the criteria of *Edgren v. Regents of University of California, supra*, 158 Cal.App.3d 515, where four exceptions to this requirement are laid out: (1) "The lack of jurisdiction exception contemplates situations in which the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties';]" (2) where a plaintiff "would suffer irreparable harm if he is required to 'participate in a meaningless ritual solely because it is denominated an administrative remedy[;]'" (3) absence of an adequate remedy; (4) where seeking administrative relief "would have been a futile and useless gesture." (*Id.* at pp. 519-523.)

Before we can decide if the trial court correctly applied collateral estoppel rules due to the existing administrative decision, we must set out the requirements for such a finding:

> "'In general, collateral estoppel precludes a party from relitigating issues litigated and decided in a prior proceeding.' [Citation.] 'Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from litigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' [Citation.] [¶] Consequently, '. . . a former judgment is not a collateral estoppel on issues which might have been raised but were not; just as clearly, it is a collateral estoppel on issues which were raised, even though some factual matters or legal arguments which could have been presented were not.' [Citation.]" (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 346.)

Molnar's argument hinges on his belief that if he, at any stage of the proceedings, should have been excused

from administrative hearing requirements, then it makes no difference that he did not participate in the administrative hearing before hearing officer Joseph Gentile, nor that he did not challenge its result by way of administrative mandate proceedings. Thus, he believes that if the trial court had independently evaluated the events that led up to the setting of that hearing, it would not have found its result to be binding. He also claims the termination and pre-termination actions were inextricably intertwined, and he should not have been precluded from presenting evidence at jury trial on both claims. In his view, this continuous chain of events (including the reasonable accommodation determination and the termination decision, along with the workers' compensation determination that he was not disabled) brings him within the exceptions set forth in *Edgren v. Regents of University of California, supra,* 158 Cal.App.3d 515 from the binding effect of administrative proceedings.

We cannot agree. Molnar initiated a grievance regarding his termination, and when it was decided against him, he appealed it to an evidentiary hearing before a hearing officer. However, he did not participate in that hearing, nor bring any request for judicial review of the hearing officer's adverse decision. That written decision was complete in scope and addressed all the medical separation issues in terms of the university policies that Molnar claimed had been violated. Hearing officer Gentile did not find any national origin discrimination or any retaliation or reprisal due to Molnar's filing of grievances. Molnar now seeks to relitigate those issues. However, we

cannot find his criticisms of the administrative process will serve to excuse him from pursuing it or his judicial remedy to seek review of it. (*Edgren v. Regents of University of California, supra* 158 Cal.App.3d at pp. 519-523.)

None of the *Edgren v. Regents of University of California* (*supra*, 158 Cal.App.3d 515) exceptions applies here. Hearing officer Gentile had jurisdiction to decide the pertinent discrimination or retaliation issues, regardless of the lack of any available further administrative review of the reasonable accommodation issue. Molnar does not fall within the irreparable harm exception due to a claim that his damages are mounting as he awaits the outcome of a void administrative ruling. The accrual of monetary damages, even if it occurs, does not constitute irreparable harm. Also, Molnar cannot show why the grievance procedure was an inadequate remedy for his termination claims. Nor did the facts surrounding denial of his grievance result in the kind of futility that would excuse him from pursuing the appeal before hearing officer Gentile or from challenging an adverse ruling through writ procedures. (Code Civ. Proc., § 1094.5.)

Rather, it appears that the criteria for application of collateral estoppel were properly found by the trial court to exist here. Specifically, there was sufficient identity of issues between these actions and the former proceeding; the issues were actually litigated; the same issues were necessarily decided in the former proceeding; and the decision at the administrative level was final and on the

merits. There is no dispute that the party against whom preclusion was sought, Molnar, is the same in both proceedings. (*Bransons v. Sun-Diamond Growers, supra*, 24 Cal.App.4th at p. 346.) As already stated, the trial court had the discretion to sever the collateral estoppel defense for separate trial and also had the power to make the necessary underlying determinations on the mixed issues of act and law that were raised. It then ruled correctly on the application of collateral estoppel, and Molnar has not shown otherwise on appeal.

Moreover, it does not make any difference that Molnar early on obtained a right to sue letter from DFEH. The Supreme Court recently explained in *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61 that "unless a party to a quasi-judicial administrative agency proceeding challenges the adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions," and that holding applies to a public employee's discrimination claims under FEHA. (*Id.* at p. 64.) The court went on to disapprove a statement in *Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896, 910-911 that the requirement of exhaustion of judicial remedies did not apply to FEHA claims (when an administrative process provided internal remedies, but the plaintiff never obtained the requisite judicial review of an adverse administrative finding). (*Johnson v. City of Loma Linda, supra*, 24 Cal.4th at p. 72.) Thus, it is now clear under *Johnson* that if a public employee pursues administrative employment-related remedies, receives an adverse finding,

but fails to have the finding set aside through judicial review procedures, the adverse finding is binding on any later discrimination claims under the FEHA. (*Id.* at p. 76.) There is no reason why this holding should not apply in this context of a claim against the Regents, due to the available administrative remedies in that system Accordingly, the trial court had an adequate basis to dismiss the FEHA claim in the termination action.

B.

Pre-termination Action

The following causes of action of the pre-termination lawsuit were disposed of after trial on the Regents' defenses: The FEHA cause of action for national origin discrimination, the retaliation claim brought under section 8547.10, the Labor Code section 1102.5 claim, and the defamation cause of action. We have already discussed the dismissal of the latter three of these claims on various grounds, in part I, *ante*. Here, we need only address the dismissal of the FEHA claim in terms of whether the trial court erred as a matter of procedure in finding that claim was barred due to Molnar's failure to show an adequate excuse from pursuing his administrative remedies.[8]

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[8] Although Molnar agreed at trial to have the court address certain of the Regents' defenses first, he sought to preserve his argument that underlying factual matters precluded such a procedure, and that jury trial was warranted. We assume his waiver of these defenses was a partial and a procedural one, and address the merits of his arguments.

According to Molnar, in this context also, the trial court should have independently evaluated the events that led up to the setting of the administrative hearing before hearing officer Joseph Gentile, and should not have found it dispositive that Molnar did not participate at that administrative hearing but was nevertheless bound by its result. Rather, Molnar contends that if he had had a jury trial, he could have showed a factual basis for his claimed excuse from administrative remedy requirements, and the trial court used erroneous procedure in declining to allow him to do so. Also, he contends that the trial court erred in imposing evidentiary sanctions to prevent Molnar from proving these claims (as we have already discussed above).

We have already rejected these same arguments on substantive grounds, as discussed above. We further reject them on procedural grounds, since Molnar has not shown any entitlement to jury trial to resolve these underlying factual issues pertaining to the Regents' defenses against this claim. It was appropriate for the trial court to consider and resolve the mixed questions of fact and law as to the appropriateness of the administrative hearing requirements as applied to Molnar. (*Windsor Square Homeowners Assn. v. Citation Homes, supra*, 54 Cal.App.4th at pp. 557-558.)

Finally, the rule stated in *Johnson v. City of Loma Linda, supra*, 24 Cal.4th 61 applies, that a public employee who pursues administrative employment remedies, receives an adverse finding, but fails to have the

finding set aside through judicial review procedures, cannot avoid the conclusion that the adverse finding is binding on discrimination claims under the FEHA. (*Id.* at p. 76.) The trial court did not err in its conclusions on the pre-termination action issues.

IV.

Costs

After trial, the Regents filed a costs bill for a total of $30,443.61, which included $14,000.80 deposition costs and $4,848.07 costs for service of process. Also, $11,594.74 was billed for exhibits. Molnar brought a motion to tax costs as excessive, and the Regents responded with opposition containing extensive documentation of the billings made. The court held a hearing and examined the depositions, then issued an order that limited the costs awarded to $14,070.39. Judgment was entered accordingly.

Code of Civil Procedure section 1033.5 sets forth the items of costs which may be recoverable in a civil action. "An item not specifically allowable under subdivision (a) nor prohibited under subdivision (b) may nevertheless be recoverable in the discretion of the court if 'reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.' ([Code Civ. Proc.,] § 1033.5, subd.(c)(2).) [¶] If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that

they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs. [Citations.] *Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion.* [Citation.] However, because the right to costs is governed strictly by statute . . . a court has no discretion to award costs not statutorily authorized. [Citations.]" (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774 (emphasis added).)

Molnar's challenges to the trial court's award of costs are as follows: (1) although the trial court disallowed costs as to four videotaped depositions of Molnar, the court still allowed excessive deposition costs for the ten total depositions of Molnar that were taken, and in any case, insufficient billing records were supplied; (2) although the trial court deleted a portion of the costs expended for registered service of process, the remainder allowed was still an inflated amount ($2,081); and (3) although the trial court deleted a portion of the exhibit costs billed, the remainder awarded was still excessive.

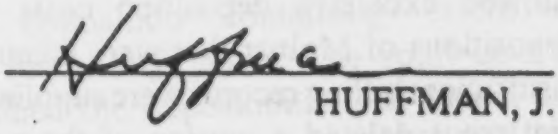
The Regents respond that (1) the 10 days of depositions of Molnar were all necessary due to his extensive pleadings, documents, and the 2½ years of disciplinary acts that gave rise to these actions; (2) the Regents were justified in acting with caution and formality toward Molnar due to the history of the litigation; (3) the exhibit costs were all valid and there is sufficient evidence

to support then.

On balance, it appears that the trial court conscientiously weeded through the costs requests in an effort to make a reasoned exercise of discretion on the costs award, based upon all the relevant circumstances. There is sufficient documentation in the record for the amounts requested. We cannot say that the trial court's discretion was abused in this instance.

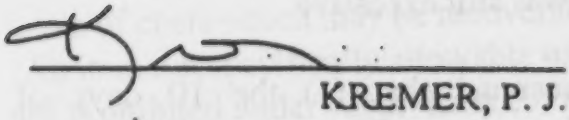
DISPOSITION

The judgment of dismissal is affirmed. Each party to bear its own costs.

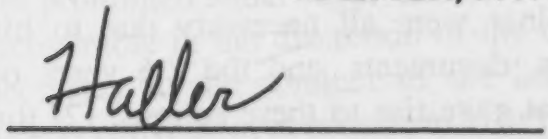


HUFFMAN, J.

WE CONCUR:



KREMER, P. J.



HALLER, J.

EXHIBIT B

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

PAUL MOLNAR,	)	D033080
	)	
Plaintiff and Appellant,	)	(Super.Ct. Nos.
	)	685793/711535)
v.	)	
	)	ORDER DENYING
REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,	)	PETITION FOR REHEARING
	)	
Defendants and Respondents.	)	

FILED
Stephen M. Kelly, Clerk
JAN 12 2001
Court of Appeal Fourth District

THE COURT:

The petition for rehearing is denied.

KREMER, P. J.

Copies to: All parties